

Sunarwati (Migration) [2018] AATA 2844 (29 June 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Christina Sunarwati
CASE NUMBER:	1702119
DIBP REFERENCE(S):	BCC2015/3183947
MEMBER:	Simone Burford
DATE:	29 June 2018
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations • cl.820.221(1) of Schedule 2 to the Regulations • r.2.03A

Statement made on 29 June 2018 at 1:16pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Spouse or de facto partner – Met online – Sponsor’s need for ongoing treatment – Sponsor’s mental health – Family business – Applicant’s supplement income – Joint account – Joint correspondence – Witness statutory declarations – Strong third party support – Duration of relationship – Decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65, 359AA, 375A

Migration Regulations 1994 (Cth), rr 1.09A, 2.03A, Schedule 2 cls 820.211, 820.221

CASES

Burton v MIMIA [2005] FCA 1355

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 17 January 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 30 October 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211(2)(a) because the delegate was not satisfied that the applicant was the spouse or de facto partner of the sponsor as defined under the Act.
4. The applicant appeared before the Tribunal on 13 March 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's sponsor, Mr Damien Jones. The Tribunal hearing was conducted with the assistance of an interpreter in the Indonesian and English languages.
5. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. At the hearing, the parties were given a further 14 days to make any additional written submissions or to submit any additional information to the Tribunal. Submissions and information were provided to the Tribunal within this timeframe.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the relationship between the applicant and the sponsor meets the definition of 'de facto' in section 5CB of the Act.

Whether the parties are in a spouse or de facto relationship

9. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is Australian Citizen. A copy of the sponsor's Australian passport was provided.

Are the parties in a de facto relationship?

10. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
11. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it including material submitted by the applicant prior to and following the Tribunal hearing.
12. Based on the material contained on the Department's file, the Tribunal acknowledges that it had before it significantly more information regarding the current status of the parties' relationship including, but not limited to, details of their relationship prior to the application being filed and third party oral testimony from family members which supported the parties' account of their relationship.

13. Relationship background

14. The applicant has never been married. The sponsor was previously married in May 2000. He was divorced in June 2008. A copy of his divorce papers was provided. He has two children from this relationship who he testified live with their mother in Sydney or Melbourne. He does not have any contact with his children.
15. The parties claim to have met through an Asian dating website in early 2008. At this time the applicant was living in Central Java, Indonesia and the sponsor was living in Australia. The parties indicated that they began speaking regularly to each other over Skype sometimes as many as three times a day. They decided to start dating and towards the end of 2008 decided to live together. The applicant rented a property in Indonesia with money contributed by the sponsor. The sponsor arrived in Indonesia in December 2008.
16. The sponsor was introduced to the applicant's family and spent Christmas together in December 2008. They became engaged on the 30 December 2008 and celebrated with the applicant's family. The sponsor stayed in Indonesia until his visa expired and he returned to Australia in January 2009. He applied for a visa to stay in Indonesia and returned in February 2009.
17. The parties lived together in a rental property in Indonesia. They developed and export business from Indonesia to Australia where they worked together.
18. In September 2009 the sponsor fell ill. He was hospitalised with malaria and diabetes. In March 2010 the sponsor fell ill again and was hospitalised. His family came from Australia to support him. A decision was made to evacuate the sponsor to Australia where he continued hospital treatment. While he was hospitalised the parties maintained contact mostly via SMS.
19. The couple met in Singapore in July 2010. During this visit the sponsor fell ill again and the applicant returned to Australia with him for treatment. From July to October 2010 the applicant and sponsor lived with the sponsor's mother while he underwent rehabilitation and therapy. They returned to Indonesia in November 2010. In December 2010 they returned to Australia for Christmas and to spend time with family. In January 2011 the applicant's father

fell ill in Indonesia and passed away. They returned to Indonesia where they lived in Java until April 2015. The sponsor was hospitalised again. The couple made a decision to move to Australia to ensure access to ongoing treatment for the sponsor.

20. The applicant initially entered Australia in May 2015 on a one-year tourist visa. They again lived with the sponsor's mother. They applied for a Partner Visa in October 2015. In December 2015 removed from the sponsor's mother's house into a home in Pearsall where they live together. In April 2017 they moved to another home in Kewdale. Their evidence is that they continue to live together at the Kewdale address.
21. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

22. *Adverse material*

23. At the hearing the Tribunal informed the applicant that a document on the Department file was subject to a s.375A certificate. The Tribunal explained that the effect of the certificate is that the Tribunal is prohibited from disclosing the document and/or information in it to the applicant. The Tribunal informed the applicant that the basis for the certification was that the document contained allegation and source had an expectation of anonymity and that disclosure of the information may identify the source.
24. The Tribunal formed the preliminary view that the certificate was valid for the reasons outlined on the certificate and invited submissions on the validity of the certificate. No submissions were made. The Tribunal decided the certificate was valid. The Tribunal provided the applicant with a copy of the s.375A certificate. The Tribunal informed the applicant that it would not be releasing the specific information to her but would be providing her with the gist of the information during hearing pursuant to s.359AA of the Act.
25. The Tribunal indicated that it would afford the opportunity to the applicant to comment upon the general terms of the information relevant to her application. The Tribunal offered the applicant the opportunity to request a short adjournment to consider her responses to the information. The Tribunal also offered the applicant the opportunity to provide written submissions or additional information in relation to those matters or any other matter relating to her application within 14 days of the hearing. The Tribunal also put the gist of the material to the sponsor for his comment.
26. The Applicant did not request an adjournment however further submissions and information were submitted to the Tribunal within the designated time frame. This included additional statutory declarations from the applicant and sponsor.
27. The Tribunal is mindful of its obligations under s.359AA of the Act to put information to the applicant for her comment or response if the information would be the reason or part of the reason for affirming the decision under review.
28. In *Burton v MIMIA* [2005] FCA 1455, Wilcox J held that a valid s.375A certificate does not override the obligation to provide *particulars* of information under s.359A(1). In doing so the Tribunal is not required to disclose specific documents that it may have in its possession; rather the obligation is to disclose only enough of the substance of the claim that may be the reason or part of the reason for affirming the decision so that the applicant can seek to answer the claim.

29. Complying with the obligations under s. 359AA of the Act, and complying also with the restriction imposed on the Tribunal by s.375A of the Act, the Tribunal raised with the applicant information received concerning the applicant and sponsor's relationship and living arrangements.
30. The Tribunal put to the applicant that there was information that the parties broke up in November 2016 but remained good friends. The information suggested the sponsor was happy to continue pretending they were in a relationship. The information suggested the applicant had a new partner. The information also suggested the sponsor had a new partner whom he met in Indonesia and is now living with in Perth.
31. The applicant indicated at the hearing that this was not true and that they were still in a relationship and living together. The applicant indicated that in addition to serious diabetes the sponsor suffered from bipolar disorder. At times the sponsor's illness had created difficulties in the relationship but that they had always been together since 2008. The sponsor similarly suggested that his periods of illness may have led someone to form an incorrect conclusion that they had separated at some point but this was not the case.
32. The sponsor suggested that the information may well have been provided by a former customer in Indonesia with whom he had had a dispute regarding services. Further details in relation to this issue were provided in the sponsor's statutory declaration which was submitted following the hearing. In his statutory declaration the sponsor maintains that former customer in Indonesia may be attempting to get the applicant to return to Indonesia to place pressure on him. The sponsor submitted he has been advised by Australian authorities not to return to Indonesia in the context of these demands. The sponsor's account of his business dealings was supported by a statutory declaration from his former business partner, Daniel Romasz, provided following the hearing.
33. The Tribunal has considered the applicant's responses to the material put to her at the hearing in the context of all the material before it in reaching a decision.

34. Financial aspects

35. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship including joint ownership of assets and joint liabilities, the extent of pooling of financial resources, any legal obligations owed by the other party and any sharing of the day-to-day household expenses.
36. The parties provided financial information which reflects their financial circumstances.
37. The parties gave evidence that they have lived in both Indonesia and Australia and have run import/export businesses in both countries. They testified that they have shared finances and day-to-day expenses since moving in together in December 2008. During the periods they have been running businesses their costs have predominantly been met through the businesses and often through cash withdrawals. The company went into receivership in April 2017. The couple are now trading again in an import/export business.
38. In Indonesia they operated a business account in the sponsor's name. The applicant also had a personal account in her name. Copies of statements for these accounts were provided. In Australia they have a joint account. Copies of the statements for that account were also provided.
39. They do not currently have any assets following the sale of their cars last year when the sponsor's previous business ran into financial difficulty and was wound up. A flat which was

owned by the sponsor's business in Ascot is rented out to a friend. Due to the company receivership there have been issues selling or commercially renting the property.

40. The applicant has supplemented their income in Australia through casual work as a massage therapist. She is usually paid in cash for this. One of her neighbours at the Kewdale address, Annette Tunhia, attested to the genuineness of the relationship and to receiving massage services from the applicant.
41. The Tribunal is satisfied based on the evidence provided that the parties' financial arrangements are such that would indicate a genuine de facto relationship and have been so since December 2008.

42. *Nature of the household*

43. The Tribunal has had regard to the evidence as to the nature of the household including the parties' living arrangements and any sharing of housework.
44. The parties provided testimony that they lived together in Indonesia from December 2008 when the sponsor first went to Indonesia. A certified translation of a lease agreement in the applicant's name for a property in Indonesia was provided commencing December 2011. A certified translation of a lease for what appears to be a property in the same complex but a different unit number was provided for a lease in the applicant's name commencing 15 November 2013. Bank statements and other correspondence addressed to the applicant and the sponsor at both addresses were provided up to and including 2015. Correspondence for the earlier address goes back to 2009 for both parties.
45. The parties provided testimony that lived with the sponsor's mother, Mary Jones at a property in Kingsley from mid-2015 until the end of 2015. Ms Jones provided two statutory declarations to this effect. Ms Jones noted that while at her home the parties shared household responsibilities. Correspondence, including bank statements addressed to the parties at the Kingsley address in 2015, was provided.
46. At the end of 2015 the parties moved to a rented property at Pearsall. A rental application and bond receipt for the property were provided indicating the tenancy commenced in late 2015. Various documents from the rental agents to the parties regarding the tenancy were provided. Utility bills in the sponsor's name for the property were provided. Correspondence addressed to both parties jointly and individually from 2016 at the address was also provided.
47. The parties testified that they moved together to a rented property at Kewdale in April 2017. They provided copies of a lease in both names from April 2017 to April 2018 for this property. Rental receipts were also provided. Utility bills for the Kewdale property in both names and in the sponsor's name were also provided. Their landlady, Maria Burgess, provided a statutory declaration confirming their joint tenancy. She has confirmed she has seen the couple together at the house on several occasions and that it is furnished in a manner consistent with a cohabitating couple.
48. The Tribunal is satisfied on the sworn evidence that the nature of the parties' household is such that would indicate a genuine de facto relationship and has been so since February 2009.

49. *Social aspects of the relationship*

50. The Tribunal has had regard to the evidence provided as to whether the parties represent themselves to others as being in a genuine de facto relationship, the opinion of the parties'

friends and acquaintances about the nature of the relationship and any basis on which the parties plan to undertake joint social activities.

51. The parties have provided supporting material including photographs in group settings and with friends and family. There is strong third party support for the relationship in the form of statutory declarations and statements from friends, family and business associates.
52. Ms Jones, the sponsor's mother, provided sworn evidence that she met the applicant in 2010 in Indonesia when the sponsor was ill in hospital. The applicant also met the sponsor's sisters and aunt at this time. Two of the applicant's sisters provided statements stating that they first met the sponsor in December 2008 and supporting their account of their life together in Indonesia. Both sisters, the applicant's mother and other family members spent time with the applicant and sponsor in Australia in 2017 staying with the couple at their Kewdale residence. One sister also visited in 2016. Some photographs of these visits were provided.
53. Third party statements supporting the relationship were from a variety of sources and provided evidence supportive of the couple's account of the relationship. The Tribunal places significant weight on these statements.
54. The evidence portrays a couple who are committed to each other and recognised as being in a de facto relationship by their friends, families and acquaintances. This is consistent with the way the couple presented at the oral hearing. The Tribunal is satisfied based on the supporting documentary evidence that the parties represent themselves socially to be in a de facto relationship.

55. Nature of the parties' commitment

56. The Tribunal has had regard to evidence provided in relation to the nature of the parties' commitment to one another including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.
57. The parties have been in a relationship since late 2008. This is a significant amount of time. They have demonstrated that they have consistently lived and sometimes worked together during the more than nine years of the relationship.
58. The sponsor has had significant health issues during the relationship including diabetes and bipolar disorder. Medical evidence was provided to support this. The applicant and sponsor gave evidence that the applicant has provided physical and emotional support to the sponsor throughout his illnesses, including in moving to Australia where the couple felt he would get better medical care than he could in Indonesia. The parties both testified that the sponsor's illnesses have at times strained the relationship, particularly his bipolar disorder, however the applicant has been an important mainstay in supporting him through these periods. Medical evidence was also provided by the sponsor's treating physician in March 2018 indicating the applicant regularly attends medical appointments with him.
59. The applicant also testified that the sponsor supported her through a miscarriage earlier in the relationship. She also testified that he had supported her through the death of her father which was unexpected and stressful as they were unable to get back to her family in time to attend his funeral.
60. Further, the parties gave evidence that they have supported each other in business endeavours including through a period of significant financial strain.

61. The parties presented at the hearing as a close and committed couple. This was supported by strong third party evidence. The Tribunal is in no doubt as to the genuineness of their relationship. They clearly provide companionship and emotional support to one another and view the relationship as long-term.

62. *Conclusion*

63. A number of issues were put to the applicant arising from material on the departments' file.

64. Having regard to the general nature of the allegation and the parties' evidence in response, the Tribunal accepted the parties' evidence with respect to these issues.

65. Based on the evidence before it the Tribunal is satisfied that at the time of the application and at the time of the decision the parties have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal finds the parties are in a genuine and continuing relationship and that they live together or not separately and apart on a permanent basis and have done so since December 2008.

66. The Tribunal is also satisfied the parties are not related by family.

67. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and at the time of this decision.

68. Therefore, the applicant meets cl.820.211(2)(a). The Tribunal accepts that the applicant was sponsored and therefore meets cl. 820.211(2)(c), and as she was the holder of a substantive visa at time of her application, cl.820.211(2)(d) does not apply. The applicant continues to meet these requirements at the time of decision. She therefore meets cl.820.221(1).

Are the additional criteria for a de facto relationship met?

69. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.

70. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.

71. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement. As noted above, the Tribunal is satisfied that the parties have been in a de facto relationship since December 2008. The Tribunal has found that since the sponsor moved to Indonesia in December 2008 the parties have been living together or not separately and apart on a permanent basis, they have had a mutual commitment to a shared life to the exclusion of all others and have been in a genuine and continuing relationship.

72. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.

73. For these reasons the Tribunal **is** satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
74. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

75. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221(1) of Schedule 2 to the Regulations
 - r.2.03A

Simone Burford
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).